UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

CHAPIN HILL AT RED BANK

and

Case No. 22-CA-067608

LOCAL 707, HEALTH EMPLOYEES
ALLIANCE RIGHTS & TRADES (H.E.A.R.T)

Joshua Mendelsohn, Esq., for the General Counsel Morris Tuchman, Esq., for the Respondent

Supplemental Decision on Remand

I. Procedural History

On September 7, 2012,¹ I issued a recommended Decision and Order in the above-referenced matter finding that Chapin Hill at Red Bank (Employer or Respondent) violated Section 8(a)(5) and (1) of the act by failing and refusing to meet and bargain with Local 707, Health Employees Alliance Rights and Trades (H.E.A.R.T) (Charging Party or the Union) to replace the contractual pension plan which was no longer available to bargaining unit employees, as was alleged in the complaint.²

On September 28, the National Labor Relations Board issued a decision in the matter of *Cofire Paving Corp.*, 359 NLRB No. 10 (2012), addressing an employer's notice and bargaining obligations when faced with the discontinuation of existing benefits owing to circumstances beyond the employer's control.

¹ Until or otherwise indicated, all dates are in 2012.

² The charge filed on October 25, 2011, upon which the initial complaint was based alleges as follows: "Employer has failed and refused to bargain, negotiate or discuss replacement fund(s) for the pension fund, which is necessary because Local 707 members cannot participate in the Local 74 Pension Fund, as originally negotiated. Employer is not making contributions to any fund, as required under the contract, while completely ignoring the union's requests to bargain, negotiate or discuss a replacement for said pension fund. This is causing serious disaffection among members." The initial complaint alleged that the Respondent violated the Act by failing and refusing to bargain with the Union about a new pension plan to replace the contractual plan which was no longer available to bargaining unit employees. No other allegations of unlawful conduct were alleged.

Thereafter, on June 3, 2013, the Board issued a Decision and Order Remanding [the instant case] to the undersigned. There, the Board directed me to "[consider] ... the relevance of *Cofire Paving* to the remaining issues."³

The Board authorized me to allow the parties to file briefs on the remanded issues and, if warranted, reopen the record to obtain evidence relevant to deciding those issues.

5

10

15

20

25

30

35

40

45

50

Consistent with the Board's instructions, on June 6, 2013,⁴ I issued an order affording the parties the opportunity to file statements of position and supporting briefs outlining the issues raised by the Board's remand. I further directed that any party seeking to reopen the record to adduce further evidence relevant to the Board's order submit an appropriate motion, together with an offer of proof as to what evidence would be adduced, in any reopened hearing and why such evidence would shed light on any issue raised by that party.

On July 25, Counsel for the Acting General Counsel (hereafter referred to as the General Counsel) submitted a motion requesting that I: (1) expand the remedy as set forth in my decision to require that Respondent not only bargain with the Union over the identity of the pension fund, but to further order that Respondent calculate and set aside contractual contribution levels for its employees' pension as contemplated by their collective bargaining agreement; and (2) reopen the record in this matter to allow for an amendment to the complaint regarding Respondent's alleged failure to calculate and maintain adequate levels of funds to satisfy their pension contribution obligation. The General Counsel further took the position that, based upon factual findings as set forth in my original decision, reopening the record to adduce further testimony or other evidence was not necessary.

Neither the Union nor the Respondent filed any statement of position in response to my June 6 order. On August 8, I granted the General Counsel's motion and, on August 23, a First Amended Complaint (amended complaint) was filed, providing that Respondent had until the close of business on September 5 to file an answer to the amended complaint.

The amended complaint contains several allegations which were not encompassed by the original complaint in this matter. In sum, the amended complaint alleges that (1) under the terms of the parties' most recent collective-bargaining agreement, Respondent was required to make pension contributions beginning in September 2010; (2) that since September 2010, Respondent has failed to calculate and set aside pension contributions owed to employees; (3) that since September 2010, Respondent has failed to maintain adequate levels of funds to satisfy its pension contributions as set forth in the collective-bargaining agreement; (4) that Respondent has failed and refused to bargain collectively over the disposition of the contractually-required pension fund contributions; (5) that the foregoing subjects are mandatory subjects for the purpose of collective bargaining and (6) by its refusal to bargain over the foregoing matters, Respondent refused to bargain within the meaning of Section 8(d) and in violation of Section 8(a)(5) and (1) of the Act.

³ The Board agreed, for the reasons stated in the decision, that the allegation involved in the matter before me was not appropriate for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and its progeny. 359 NLRB N0. 125, slip op. at 1, fn. 2. The Respondent had also raised a Section 10(b) defense, which I rejected. The Board did not explicitly address this issue. I affirm my findings of fact and conclusions of law with respect to any 10(b) issue raised by Respondent as to the initial complaint; my findings regarding any related contention regarding the amended complaint are discussed below.

⁴ Going forward, all dates are in 2013, unless otherwise indicated.

The General Counsel now seeks a decision finding that Respondent has violated the Act as alleged in the amended complaint and maintains that, in any event, it is appropriate for me to issue an order requiring Respondent to calculate the pension contributions owed to unit employees from September 1, 2010 to date, bargain with the Union over the disposition of the contributions and make unit employees whole for any losses suffered consistent with the Board's decision in *Cofire Paving*, supra, based upon findings of fact made in the underlying hearing.

On August 28, Respondent filed an answer to the amended complaint denying the substantive allegations contained therein and raising certain affirmative defenses: i.e. that the allegations are barred by the Board's statute of limitations; that retroactive application of new law after litigation at trial results in manifest injustice and that the Board's decision in *Cofire* requires only bargaining and does not provide for a make whole relief that is not agreed to by the parties.

15

20

5

10

I then issued an order, dated September 4. There, I noted that in my order dated August 8, I again urged the parties to consider whether it would be necessary or appropriate to reopen the record for the purpose of adducing additional testimonial or other evidence to address the issues raised by the Board's remand. As there had been no further response I announced my intention to allow the parties an opportunity to file additional statements in support of their respective positions, or in response to the positions taken by the other parties with regard to the amended pleadings and the issued raised by the remand in this matter. I further advised the parties that after September 20, my intention was to close the record and issue a supplemental decision in accordance with the direction of the Board.

25

On September 8, Respondent submitted a letter which, among other things, requested a reopened record to adduce evidence to rebut certain allegations contained in the General Counsel's amended complaint,⁵ and to contest the General Counsel's assertion that the remedy ordered by the Board in *Cofire* would be appropriate in this matter.⁶

30

Accordingly, I issued an order reopening the record in this matter and a supplemental hearing was held before me in New York, New York on November 25.7

II. The Supplemental Hearing

35

A. Positions of the Parties

⁴⁰

⁵ Respondent contests my characterization of the .General Counsel's motion to amend the complaint as "unopposed." In particular, Respondent argues that my initial order failed to provide any "provision or permit to respond to the possible motions that would be filed. Rather all parties were asked to respond on the same day concerning their response to the remand. Respondent saw no need to respond on its own" (letter dated September 8).

⁴⁵

⁶ Respondent, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013 (No. 12-1281) and other circuit court law has also argued that I should dismiss the complaint, as the Board lacked a lawful quorum when it issued the instant decision. Construing Respondent's argument as tantamount to a motion to either dismiss or stay these proceedings, it is denied. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, fn. 1 (2013). Respondent's argument that retroactive application of any remedy imposed by the Board in *Cofire* would result in "manifest injustice," has been considered in this supplemental decision.

⁵⁰

⁷ The hearing, originally scheduled for October 17 was rescheduled due to the shutdown in government operations.

The General Counsel argues that *Cofire* establishes that it is a separate unfair labor practice for an employer to fail to calculate and set aside old contractual contributions, even if the fund to which it is to contribute is no longer viable, until it has fulfilled its bargaining obligation regarding the identity of the fund and even if it unable to remit contributions due to circumstances beyond its control. The General Counsel further maintains that *Cofire* requires Respondent to maintain its contributions until it fulfilled its bargaining obligation over the identity of the fund to which such contributions should be made. The General Counsel argues that the evidence adduced in the underlying record is sufficient to establish the alleged violations of the Act as set forth in the amended complaint and to support an expanded remedy here. The General Counsel argues that its motion to reopen the record to add the above noted additional allegations relating to the Employer's failure to set aside and calculate pension contributions is warranted under the Board's Rules and Regulations and decisional Board law.

The General Counsel further argues generally that, inasmuch as the Respondent engaged in the same conduct as that found unlawful in *Cofire*, the same remedy should obtain. In particular, it is argued that the record in the instant case establishes that Respondent agreed to make pension contributions on behalf of its employees, failed to make such contributions due to circumstances beyond its control and failed to set aside and calculate the amounts owed to employees. It is further noted that, as found in the underlying decision in this matter, Respondent failed to provide the Union with an opportunity to bargain over alternative means of effectuating its contractual obligations. Accordingly, the General Counsel argues that Respondent cannot, under *Cofire*, be allowed to "simply retain the contributions for its own benefit, thereby enriching itself at the expense of its employees."

The Respondent denies the substantive allegations of the first amended complaint, and argues that the new allegations are precluded by Section 10(b) of the Act. Respondent further argues that the issue presented to me in the underlying case was exceedingly narrow: i.e., whether the Employer was obliged to bargain over a specific replacement fund. Respondent maintains that the *Cofire* decision introduces entirely new issues; in particular, what to do with the monies that are "now in play." Respondent further argues that I reconsider my determinations about deferral and whether the allegations of the complaint are barred by Section 10(b) of the Act. Respondent additionally maintains that any remedy the Board would order runs afoul of *H.K. Porter v. NLRB*, 397 U.S. 99 (1970), because the Board would be assuming jurisdiction over the subjects of bargaining between the parties. Relying upon *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012), Respondent further contends that retroactive application of new law after litigation at trial results in manifest injustice. Respondent additionally argues that *Cofire* requires bargaining only, and does not provide for make whole relief that is not agreed to by the parties.

Respondent additionally argues that it did not unjustly enrich itself by withholding pension contributions because the parties bargained and subsequently reached agreement to use the contractually mandated pension contributions to offset certain increases in health insurance costs. The General Counsel and the Union take the position that no such agreement was reached.

B. Evidence Adduced at the Reopened Hearing

At the hearing on remand in this matter I received testimony from Respondent's Executive Director Joseph Schlanger (Schlanger) and rebuttal testimony from Union President Odette Machado-Ramadeen (Machado). In addition, certain documents were placed into evidence, the relevant portions of which are summarized or set forth below.

The collective bargaining agreement (Agreement) which was the subject of the underlying case appears to have had a term of 2008 through 2013. At the instant hearing Machado was uncertain about the precise dates. Based upon the evidence adduced in the underlying case however, I concluded the Agreement, which had largely incorporated a collective-bargaining agreement with a predecessor labor organization (the 1199 Agreement) was effective until June 15, 2009 and thereafter would automatically renew for an additional period of 4 years unless a party provided written notice to the other of its desire to terminate the agreement or modify its terms. See 359 NLRB slip op. at 2.

As was noted in the underlying decision in this matter, at the time the Agreement was entered into, it was expected that the Union would be affiliating with Local 74, U.S.W.U. I.U.J.A.T. (Local 74), another labor organization. Schlanger testified that he learned that this proposed affiliation would not take place in about June 2010 and health insurance coverage for employees ceased at some point shortly thereafter.

Schlanger testified on several occasions that the parties held "countless" conversations as to how to provide health insurance for employees.

On March 14 and March 30, 2011, the parties held a hearing before contract arbitrator Elliott D. Shriftman regarding the Employer's alleged failure to provide health insurance coverage to eligible employees. On the second day of hearing, the parties reached a settlement of this matter and entered into a consent award issued by the arbitrator on April 11, 2011. The settlement, by its terms, addressed only the Employer's obligation to pay health insurance benefits to employees, and did not address any pension fund obligation. Under the new health insurance plan put into place by the Employer, costs increased significantly, and continue to increase each year.

Schlanger testified that, in exchange for health insurance benefits fully funded by the Employer, the Union agreed that the pension contributions due under the collective-bargaining agreement would be used to offset the increased costs to Respondent. He further testified that this agreement was reached in about March of 2012; however, he subsequently stated that the agreement was reached in March 2011 but not implemented until September 2011, because of the terms of the consent award.

Machado denied that any such agreement had been reached and testified, "I'm hearing now that they're saying they used the monies and that's shocking to us." 8 Schlanger acknowledged that there was no written memorialization of any purported agreement. Nor was there any testimony relating to such an agreement at the underlying hearing, which took place in March 2012.

On April 27, 2011, Union counsel Thomas Rubertone, Jr. wrote to the contract arbitrator, Elliott D. Shriftman, requesting a hearing on the following issues:

The Employer violated and continues to violate the CBA by failing to pay contributions to union for training, pension and legal funds.

5

40

5

10

15

20

25

30

35

45

⁸ It appears that the Union acknowledges agreeing to using certain other funds, in particular legal and 50 training fund contributions, for offsetting the increase in health insurance costs. However, the amount of contributions to such funds is minimal.

As a remedy, the Union is requesting that the Employer make the effected (sic) employees and union whole, including but not limited to retroactive payments of the amounts set forth in the CBA.

The parties met on February 13, 2012 to commence negotiations for a successor collective bargaining agreement. The subject of increased costs of health insurance was one of many issues discussed.

After the meeting, the Union summarized what had occurred in a letter to Respondent as follows:

The Employer and Union met on February 13, 2012 to finally begin long overdue contract negotiations. During that session the Union made its proposals and the Employer advised us, for the first time, of an imminent increase in health insurance premiums. As a result of this exigency, we spent three hours negotiating all open contract issues. We tentatively agreed on the points outlined below:

- A 3 year Contract Reopener 90 to 120 days prior to Expiration of the Contract
- Provisions not modified will remain as in previous Contract
- 20 1% bonus to be paid May 2012

15

25

30

35

40

45

50

- 1.5% wage increase to be effective as of March 1, 2012
- 2% wage increase effective March 2013
- 2% wage increase effective March 2014
- New health insurance plan to be paid by Employer (new plan at lower premiums) with \$750 card for higher deductible/copays to each eligible member
- 401K to be funded annually beginning December 13 at 2% gross payroll
- Dental plan to be offered for a corresponding payroll reduction.

In light of your cancellation of the second session of negotiations scheduled for February 23, 2012 and threats to impose payroll deductions for health insurance premiums, it is imperative that your client ratify or otherwise respond to the above provisions negotiated on February 13, 2012. The fact that Health Insurance costs have increased during this Employer cannot be transferred to employees in the form of threatened payroll deductions. It would appear that both Union and Employer have a need to reach agreement as soon as possible. Changes in Health Insurance as well as any payroll deductions remain a mandatory subject of bargaining despite an arbitration award that merely fixes the Employer's cost under the current contract.

Be further advised that THERE HAS NEVER BEEN ANY CONSENT or authorization from the Union to use funds your client holds in trust for employees in "pension" contributions for any other purpose. As you are well aware the Union only agreed at arbitration to divert training and legal fund contributions. To offset the difference in health insurance premiums. Since then you have delayed bargaining. The Employees will not bear the prejudice of this delay. The best and only good faith solution for all is to reach agreement on the new contract.

Schlanger testified that the bullet points were new items the parties wished to add; and that other terms were maintained. He further testified that he considered the above statement regarding the Union's lack of consent to use pension contributions for offset health insurance premiums to be a "disclaimer," because the Union might want to raise the issue at another time. He stated that Respondent would not "swallow" the increase in health insurance costs without having such an agreement with the Union.

Shortly after the Union's letter, referenced above, Respondent's attorney Ari Weiss, sent an e-mail communication dated February 17, 2012. In relevant part, the communication states:

"Health Insurance – We haven't heard back from you regarding the Employer's proposal to switch to a new plan. If the current plan is renewed for another plan (March 1) year then the rates will be increased or both single and family plans and the employees will be responsible for any rate increase."

In fact, sometime during the month of March 2012, the Employer circulated to employees a letter stating that going forward employees who wished to maintain health insurance coverage would be obliged to contribute to the costs of the plan.

On cross-examination, Schlanger was asked about Weiss's email and the fact that, by its terms, it contains no reference to any agreement to offset increased costs with pension fund contributions. His response was as follows:

So it – which means that we were okay with the increased rates up until the renewal. So that means we were paying for it already one year. . . So, yeah, it does address the fact that we agreed, we had an agreement up until the renewal...Now, it seems my attorney is saying, "Well now, if we don't switch plans March 1st, as most of the time there is with the renewal period, there's going to be an increase"...Up until then we had an agreement that we were going to pay for it but up until the renewal date.

Machado testified that at some point the parties met with the Arbitrator, who stated that he would attempt to mediate the issue of the pension contributions. According to Machado, while the Union agreed to an offset from monies owed to the training and legal funds, the Union did not agree to use the pension fund obligation for that purpose. The evidence as to when this meeting took place is inconclusive. It appears from the record, however, that in August 2012 the parties and the mediator met with the Employer at attorney Weiss's office. The Union was advised that that the Employer was, in fact, using the owed pension fund contributions to offset health insurance costs and expressed its disagreement. The arbitrator did not issue an award regarding the Union's grievance over the Employer's failure to pay into a pension fund. As Machado testified: "There was no arbitration so that he wouldn't have – he wouldn't have issued an award."

On Monday, July 1, 2013, Machado wrote to Respondent's owner, Zev Farkas, and demanded that Chapin Hill comply with the Board's order in the underlying matter and "meet with the Union to bargain over a fund for pension payments due under the contract." The record does not contain any evidence of a response.

III. Analysis and Conclusions

5

10

15

20

25

30

35

40

45

50

A. The Cofire Decision

As the Board explained, *Cofire* concerns an employer's obligation to maintain terms and conditions of employment when one labor organization replaces another as the collective bargaining representative for a unit of employees. In that case, in August 2005, Local 175, United Plant & Production Workers Union (Local 175) was certified by the Board as the exclusive collective-bargaining representative of the respondent's production employees at its Flushing, New York asphalt plant. Prior to this time, the employees had been represented by another labor organization, Local 1175, Laborers International Union of North America, AFL-CIO

(Local 1175). The Board found that the respondent committed several unfair labor practices after the change in bargaining representative: in particular, by unilaterally altering certain terms and conditions of employment. While the Local 1175 collective-bargaining agreement was no longer in effect, the terms and conditions established under that agreement continued in effect by operation of law pending the negotiation and completion of a new collective bargaining agreement. *Cofire*, supra, slip op. at 5 (citing and quoting *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198-199; 206-207(1991)). As the Board explained, an employer's obligation to maintain the status quo includes the maintenance of fringe benefits such as welfare, pension and annuity benefits.

10

15

5

As the Board noted, while it had not specifically addressed whether or how an employer confronted with an intervening certification is required to maintain the status quo with respect to benefits sponsored by the prior union, the Board relied upon precedent involving similar policy considerations. Of particular relevance here, is the Board's conclusion that the respondent was required to timely notify Local 175 of the discontinuation of the benefits and to bargain over securing alternative benefits. The Board additionally concluded, relying upon *NLRB v. Katz*, 369 U.S. 736 (1962), that the respondent was required to maintain existing contribution levels until it fulfilled its bargaining obligation. Assuming that Local 1175's funds would no longer accept contributions, the respondent was required to continue calculating the pension and annuity contributions according to the established formulas and to set the contributions aside for the benefit of the employees until the parties reached a new agreement on the subject or bargained to impasse. In particular, the Board found:

25

20

When an employer is faced with the discontinuation of existing benefits owing to circumstances beyond the employer's control, it is not permitted unilaterally, to replace the benefits or to remit benefit fund contributions directly to the unit employees because doing so would be inconsistent with the statutory duty to bargain. Nor is the employer permitted to do nothing and simply allow employees to be stripped of the benefits. Rather, the employer must provide the union with notice and an opportunity to bargain over the development.

30

359 NLRB No. 10, slip op. at 6.

35

The Board found that the respondent cannot be allowed to "simply retain the contributions for its own benefit, thereby enriching itself at the expense of its employees." Id. As a result, the Board ordered Cofire to calculate the pension and annuity contributions, bargain with Local 175 over the disposition of the contributions and make unit employees whole for any losses they may have suffered as a result of the respondent's unlawful cessation of contributions. Id. at 8.

40

45

In dissent, Board Member Hayes argues that the violation found "reached beyond the issues raised and litigated by the parties." 359 NLRB, slip op at 9. The Board panel majority disagreed, finding that the complaint gave fair notice of the acts alleged to constitute unfair labor practices and that the General Counsel was not required to allege in the complaint the legal theory relied upon. See *Cofire*, slip op. at 6, fn. 20.9

B. Application to the Instant Matter

50

⁹ In Cofire, as the administrative law judge noted, the relevant portion of the complaint alleged that "since October 4, 2005, the Respondent has unilaterally changed the terms and conditions of employment by failing to secure pension [and annuity] benefits for the Unit." 359 NLRB, slip op. at 9.

Section 102.15 of the Board's Rules and Regulations sets forth the pleading requirements for complaints before the Board. It requires that the complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices." As the Sixth Circuit has stated, "[a]ll that is required in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." NLRB v. Piqua Munising Wood Products Co., 109 F.2d 552, 557 (6th Cir. 1940), quoted in Artesia Ready Mix Concrete, Inc., 39 NLRB1224, 1226 (2003).

Here, I find that the complaint as initially prosecuted by the General Counsel fails to meet the remedy now sought. In Cofire, the Board noted that the General Counsel is not required to describe in the complaint the legal theory relied on. 359 NLRB slip op. At 6 (citing Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S.1003 (1994) (enforcing Board decision finding an unfair labor practice under a different legal theory than the one articulated in the complaint). Similarly, in Massey Energy/Mammoth 15 Coal, 358 NLRB No. 159, slip op. at 10 (2012) the Board noted that it, with court approval, "has repeatedly found violations for different reasons and on different theories from those of administrative law judges or the General Counsel . . . where the unlawful conduct was alleged in the complaint" (emphasis in original). Here, however, the General Counsel failed to include the acts now relied upon: i.e. Respondent's alleged failure to make pension fund contributions, in 20 the initial complaint.

Relying upon Pergament United Sales, 296 NLRB 333, 334 (1989), The General Counsel argues in its brief that, notwithstanding any conclusions I might reach regarding the allegations encompassed by the amended complaint, I may find and a remedy the violations alleged, "even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." However, the Board has found limits to this doctrine. In particular, the Board has found that while *Pergament* applies to unpled unfair labor practices, it does not extend to unpled allegations of fact. GPS Terminal Services, 333 NLRB 968, 969 fn. 9 (2001).

As the Board has explained:

The recognized principle that the determination of whether a matter has been fully litigated rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.

Pergament, 296 NLRB at 335.

5

10

25

30

35

40

45

50

I do not agree with the General Counsel that the issue of whether pension contributions were owed had been fully litigated at the underlying hearing; rather, it was an ancillary matter which was not encompassed by the limited scope of that litigation – which concerned itself exclusively on Respondent's failure to bargain over the identity of a fund which would receive such contributions. Moreover, I additionally find that the issue cannot fairly be deemed closely connected to the allegations set forth the initial complaint. In Pergament, the complaint alleged a Section 8(a)(3) refusal to hire violation. Although that allegation was dismissed, the Board found an 8(a)(4) violation based upon an employer official's testimony that he refused to hire certain employees because a charge had been filed. The Board concluded that the Section 8(a)(4) issue was closely connected to the subject matter of the complaint because both allegations focused on the same set of facts and the underlying lawfulness of the employer's motivation for failing to hire the employees in question.

Here, as noted above, unlike the complaint in Cofire, there is no allegation in the original complaint that Respondent failed to set aside or make pension and welfare contributions, notwithstanding the fact that such allegations were clearly encompassed in the charge as filed by the Union. Thus, the General Counsel is now not only urging a new theory of a violation but relying upon facts that were not directly at issue or necessary to resolve the underlying case. Thus, it cannot be said in this instance that Respondent had unequivocal notice of the conduct on its part that was alleged to be unlawful and an opportunity to be heard on such matters.

While I am sympathetic to the General Counsel's attempt to compel Respondent to adhere to its contractual obligation to contribute toward pension benefits for its employees, I am constrained to conclude that General Counsel's proposed amendments to the complaint are tantamount to a belated attempt to have a "second bite at the apple" and are inconsistent with the requirements of due process. In this regard, I note that restitution of delinquent benefit fund contributions is a standard remedy. Certainly, the General Counsel could have sought such a remedy even while the identity of the fund was being negotiated. In fact, the case authority relied upon by the Board majority in *Cofire*, which does not bear further analysis here, shows this to be the case.

Accordingly, while I continue to rely upon and affirm the findings of fact and conclusions of law set forth in my original recommended Decision and Order in this matter, I have determined that it is appropriate to dismiss the allegations of the amended complaint insofar as they purport to expand upon those encompassed by the complaint as originally litigated in this matter or to impose any further remedy as urged by the General Counsel.¹¹

C. Respondent's affirmative defenses

Cognizant of the fact that my conclusions with regard to the due process issue discussed above may be placed before the Board for review, I will briefly discuss Respondent's posited affirmative defenses.

1. Section 10(b)

10

15

20

25

30

35

40

45

50

As noted above, the underlying charge filed in October 2011, includes an allegation that the Respondent has failed to remit pension contributions. Respondent relies upon the fact that this charge was filed more than six months after the Respondent's obligation to make such contributions came due and argues that the proposed amendments area time barred under Section 10(b) of the Act. Such allegations are without merit.

¹⁰ The General Counsel's failure to include such allegations in the original complaint is unexplained.

¹¹ Respondent's reliance upon *H.K Porter* and *WKYC-TV* is misplaced. In *H.K Porter*, supra, the Board entered a remedial order "requiring the Company to check off the [union] dues of the workers." The Court held that while the Board does have the power to require employers and employees to negotiate, "it is without power to compel a company or union to agree to any substantive contractual provision of the collective bargaining agreement…" Unlike that case, however, here the parties have already bargained and agreed upon certain contract terms. Moreover, the initial order in this matter required only bargaining, but did not compel any agreement. With respect to *WKYC-TV*, that case involved the Board's refusal to apply retroactively a change in over 50 years of decisional law. This can hardly be deemed analogous to the situation presented here, where the Respondent's bargaining obligation is the subject of well-established Board law which has been extant for decades; as would it's remedial obligation pursuant to the Act had its breach of the Agreement been timely pled and proven.

The Board distinguishes between a "simple failure to abide by the terms of a collective-bargaining agreement," or "material breach violation" on the one hand, and an "outright repudiation of the agreement itself," or "total repudiation" on the other hand. *Vallow Floor, Coverings, Inc*, 335 NLRB 20 (2001), citing *A & L Underground Inc.*, 302 NLRB 467 at 469 (1991). Here, there is no contention or evidence that the Union had clear and unequivocal notice that the Respondent repudiated the Agreement in its entirety, and the record evidence reflects otherwise. When an employer has not rejected a collective-bargaining agreement in its entirety, but has instead refused to apply one or more of its provisions to unit employees, this scenario presents a breach of the contract's terms. Under such circumstances, each successive breach of the contract constitutes a separate and distinct unfair labor practice. It is for this reason that even when a union has clear and unequivocal notice outside the 10(b) period that a respondent is failing to observe the terms of the contract, the complaint would not be timebarred. Instead the 10(b) period would serve only as a limitation on the remedy to the 6 months prior to the filing of the unfair labor practice charge. *Vallow Floor*, supra; see also *Farmingdale Iron Works*, 249 NLRB 98, 99 (1989), enfd. 661 F.2d 910 (2d Cir. 1981).

2. Deferral

5

10

15

20

25

30

35

40

45

50

Respondent argues that any alleged failure to pay pension contributions should be deferred to the parties' grievance and arbitration procedure. Had this been the sole alleged violation of the Act, such a contention might well have merit. However, this is not the case.

The Board has consistently held that where certain complaint allegations are not deferrable, it will not defer to the parties' grievance and arbitration process other allegations that are closely interrelated. *Flatbush Manor Care Center*, 315 NLRB 15, (1994), *American Commercial Lines, Inc.*, 291 NLRB 1066, 1069 (1988), and S.Q. I. Roofing, Inc., 271 NLRB 1, fn. 3 (1984). Further, the Board has held that it makes no economic sense to hear and resolve one issue and then to refrain from deciding a closely related issue. *Clarkson Industries*, 312 NLRB 349 (1993). As I have found that Respondent's refusal to bargain over the identity of the pension fund was not subject to deferral, a determination affirmed by the Board, I find that as a matter of law and policy it would be appropriate to conclude that an additional allegation relating to the alleged failure to contribute to any such fund, as raised by the charge in this matter, would not be deferrable.

3. The Purported Agreement

As noted above, Respondent has argued that it did not unjustly enrich itself at its employees' expense because it applied moneys it would have contributed to a pension fund to offset the increasing costs of providing health care coverage, at no cost to its employees. Respondent claims that there was an express agreement with the Union to effect what would be, in essence, a mid-term modification of the Agreement.

Insofar as this would be an affirmative defense posed by the Respondent, it bears the burden of proof in this matter. It is well established that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products Co.*, 133 NLRB 1232 (1961); *Sage Development Co.*, 301 NLRB 1173, 1189 (1991). Here, I have concluded that, although the evidence is somewhat equivocal, Respondent has failed to meet this burden.

As an initial matter I find Schlanger's testimony about "countless" conversations held with the Union regarding this matter fails to have the ring of truth and is otherwise unsubstantiated by the record either in the underlying case or on remand. Schlanger could offer no specific detail or other corroboration of any such discussions or negotiations with the Union

and the written communications between the parties fail to establish any such sort of ongoing dialogue. On the other hand, I did not find certain aspects of Machado's testimony; in particular her exhortation, relied upon by the General Counsel and referred to in his brief, that "I'm hearing now that they're saying they used the monies and that's shocking to us," to be credible, particularly insofar as it is contradicted by other testimony proffered by this witness and documentary evidence relied upon by the General Counsel. Thus, I find that with regard to this issue at the least, the credibility of both witnesses is subject to question.

5

10

15

20

25

30

35

40

45

50

In resolving this question, however, I find it significant that, at the time of his testimony in the initial hearing in this matter, which occurred on March 13, 2012, Schlanger failed to reference any such agreement with the Union. While Respondent has argued that such evidence was not relevant to the initial case, and that there was therefore no need to refer to it in testimony, I do not agree. Clearly, if Respondent had reached an agreement with the Union which would obviate its requirement to make pension fund contributions, the so-called "identity" of the fund would be of no immediate importance and would have served as a defense to the allegations of the underlying complaint. I find therefore, that Schlanger's failure to reference this purported mid-term modification of the contract at that time to raise a strong inference that such an agreement did not exist.

I further find it of significance that Respondent was unable to adduce any notes or writing of any sort which would document such a contract modification. In fact, the only such material adduced in evidence, including communications from Respondent's counsel, fail to make any such reference or even hint that such an agreement had been reached. In a similar vein, I do not agree, as Schlanger asserted, that the Union's specific statement that it would not apply the pension obligation toward health insurance premiums constitutes nothing more than a "disclaimer." In this regard, I note that Respondent failed to counter this statement by the Union with any written documentation or other assertion that, in fact, an agreement had been reached.

Respondent has pointed to some evidence which, as is asserted, shows the existence of an agreement such as the Union's summary of contract negotiations (which includes a provision for the payment of pension monies). It is contended that there would be no need to include such a provision in its list of demands had there been an ongoing obligation to make such contributions. This is speculation which is insufficient to meet Respondent's burden of proof in this regard and is, in any event, insufficient to counter the other evidence which points toward a lack of agreement, as noted above.

Nor is the fact that the Union failed to take action to pursue the matter further either before the Board or in arbitration sufficient to meet Respondent's burden to show the existence of a mid-term contract modification. At most, the record may support an inference of tacit acquiescence on the part of the Union, but that is insufficient to meet the Respondent's affirmative burden to show that there was an express agreement to modify the terms of the Agreement so that its obligation to contribute to its employees' pension had been eliminated.

Based upon the foregoing, I reject Respondent's affirmative defense that there was an agreement between the Union and the Employer to offset health insurance costs with pension

¹² In particular, attorney Weiss' email dated February 17, 2012, fails to make any reference to an agreement regarding health insurance offsets notwithstanding the fact that, as Schlanger testified, the agreement had already been entered into. Rather, Weiss' email indicated an expectation that employees would contribute to the costs of health coverage.

fund obligations due under the Agreement which obviated the Employer's contractual obligation to make such payments.

CONCLUSIONS OF LAW AND ORDER

5

I fully affirm the findings of fact and conclusions law set forth in my recommended Decision and Order in this matter dated September 7, 2012. Based upon the foregoing, as noted above, it is hereby ordered that the allegations of the amended complaint, to the extent they are not coextensive with those contained in the initial complaint are dismissed.

10

15

REMEDY

I further find that after a due consideration of the Board's decision in *Cofire Paving Corp.*, 359 NLRB No. 10 (2012) to the remaining issues presented by this case, no further remedial action is warranted. ¹³

Dated, Washington, D.C. May 15, 2014

20

Mindy E. Landow Administrative Law Judge

25

30

35

40

45

50

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.